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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,)	Case No. 20PO00742-HBK
)	
Plaintiff,)	Yosemite, California
)	Monday, February 6, 2023
vs.)	1:00 p.m.
)	
DAVID A. NUNN,)	
)	
Defendant.)	
)	

TRANSCRIPT OF MOTION TO DISMISS
BEFORE THE HONORABLE JUDGE HELENA M. BARCH-KUCHTA
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:	BRODIE MACLEOD BUTLAND, ESQ. JEFFREY A. SPIVAK, ESQ. SEAN O. ANDERSON, ESQ. United States Attorney's Office 2500 Tulare Street Suite 4401 Fresno, California 93721 (559) 286-7331
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1 YOSEMITE, CALIFORNIA, MONDAY, FEBRUARY 6, 2023 1:00 P.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: Calling case 20-PO-742, United States
5 versus David Nunn.

6 THE COURT: Thank you. Can I please have
7 appearances for the record, starting with the Government.

8 MR. BUTLAND: Yes, thank you, your Honor. Brodie
9 Butland for the Government.

10 THE COURT: Thank you, Mr. Butler?

11 MR. BUTLAND: I'm sorry. Butland.

12 THE COURT: Butland, B-U?

13 MR. BUTLAND: B-U-T-L-A-N-D.

14 THE COURT: -- L-A-N-D.

15 MR. BUTLAND: There's only one T.

16 THE COURT: Okay. I'm sure you had a lot of jokes
17 growing up, huh. Okay.

18 MR. BUTLAND: Still do.

19 THE COURT: Well, welcome. I understand you came
20 all the way from Washington. So --

21 MR. BUTLAND: Oh --

22 THE COURT: Is that right?

23 MR. BUTLAND: I wish I could take that much
24 credit, your Honor.

25 THE COURT: Okay.

1 MR. BUTLAND: Just Fresno.

2 THE COURT: Just Fresno.

3 MR. BUTLAND: But still, nonetheless, a different
4 country.

5 THE COURT: Okay. All right. So, you got to come
6 see Yosemite.

7 MR. BUTLAND: I -- I did in the wintertime. I've
8 been here in the summer but never have been able to see the
9 snow.

10 THE COURT: Okay.

11 MR. BUTLAND: So, this is a good first experience.

12 THE COURT: Well, it's beautiful any time of the
13 year. So --

14 MR. BUTLAND: That is the truth.

15 THE COURT: Thank you.

16 And appearing on behalf of the Defendant?

17 MR. GERSON: Good mor -- sorry. Good afternoon,
18 your Honor. Benjamin Gerson for Mr. Nunn. Mr. Nunn is not
19 present today. I believe he has a Rule 43 waiver. He did
20 plan to join us by telephone, but I understand the line is
21 down.

22 THE COURT: Oh. Do you want to -- we could -- if
23 you have a cell phone, if you want to --

24 MR. GERSON: I let him know I'll keep him apprised
25 of the proceedings.

1 THE COURT: Okay. All right. Well, thank you and
2 welcome back, Mr. Gerson. How is your new assignment in
3 Arizona?

4 MR. GERSON: I'm in Las Vegas, but it's very good.
5 Thank you.

6 THE COURT: You're in Vegas. Okay. Las Vegas,
7 even better.

8 MR. GERSON: So, it's nice to be back.

9 THE COURT: So, now you're back in the cold. Did
10 you come in a few days early at least to get some skiing or
11 anything?

12 MR. GERSON: I came into Fresno last night.

13 THE COURT: Okay.

14 MR. GERSON: So, just a quick trip this time.

15 THE COURT: All right. So, we're here -- the
16 Court had requested a hearing on the motion to dismiss that
17 had been filed. This was previously -- there was a -- an
18 opposition, a reply. We held an argument. The Government
19 had requested to supplement at that point. I had permitted
20 the Government to supplement, and then the Defendant had
21 obviously filed then a reply memorandum to that supplement.

22 So, I had some questions. I'm still happy to
23 listen to argument from both sides on the issue, and I -- I
24 guess -- I guess first I'll let -- Mr. Gerson, is there
25 anything additional you would like to add since our last

1 hearing since the Government has filed a supplement and has
2 kind of changed somewhat the opposition from what the
3 original papers had stated. So, I don't know if you want to
4 address that or -- I mean, I did read your reply as well,
5 but if you want to further address it, I'm happy to hear
6 argument on it.

7 MR. GERSON: Judge, for now, just in the interest
8 of keeping things expedient, I'll -- I'll rest on the
9 briefing.

10 THE COURT: Okay.

11 MR. GERSON: If there are any other issues that
12 come up, I'll be happy to address them, but I think -- I
13 think we responded adequately to the Government's points in
14 the supplemental --

15 THE COURT: Okay.

16 MR. GERSON: -- brief.

17 THE COURT: And anything that you want to add
18 before we go into questionings at all or --

19 MR. BUTLAND: Yes, your Honor. You know, one of
20 the things that I've been a little bit curious about in
21 going back to the briefing is I'm still not 100 percent sure
22 exactly what Mr. Nunn's arguments are because when you look
23 between the briefing, there are -- there are clear chefs,
24 and just to give one example for the record, the initial
25 reply from June of 2021 says on page six:

1 "The Government misconstrues Mr.
2 Nunn's challenge to 36 CFR 217(a) as a
3 broad attempt to overturn the regulation
4 as a whole. Mr. Nunn challenges only
5 the application of the regulation to his
6 alleged activities, that is, base
7 jumping. He asks only for his case to
8 be dismissed in that the substance of the
9 regulation cannot be applied to base
10 jumping."
11 So, this is a substantive argument. In the reply
12 at ECF 43 in January of 2022, the most recent one, page two
13 to three:
14 "Mr. Nunn has never argued that
15 base jumping was not covered by the
16 prohibition on delivering a person by
17 parachute."
18 So, they -- they -- so, I guess one of the
19 difficulties I'm having as the Government is trying to hit a
20 moving target. And, so, I'm hoping maybe with this hearing
21 we can clarify what precisely the argument is so that I can
22 respond a little bit more pointedly to it.
23 THE COURT: Okay. And I appreciate that, and
24 that's my concern, which is why I'm having the hearing
25 today.

1 There was a couple of things, Mr. Gerson, that you
2 raised. The one -- one thing that was consistent was the
3 position that base jumping is flat out banned in Yosemite
4 National Park, and that's where I have a -- a real concern
5 because I read the Superintendent's Compendium not to have
6 an outright ban but to permit it only if a permit is first
7 applied and obtained.

8 Now, I don't know if you're going to the next leap
9 and saying, Well, they've never ever issued permits. I
10 don't know if anyone's ever applied for permits. You know
11 what I mean? So, that's one of the issues I have. But it's
12 clear in the compendium, unless I'm misreading the
13 compendium, that under the 2020 superintendent's compendium,
14 which would have been in effect at the time on page 21, 36
15 CFR 1. -- Section 1.6, Activities that require a permit:

16 "The following is a compilation of
17 those activities which require a permit
18 from the Superintendent."

19 And then it states Section 1.5(d) relating to
20 public use limits, and then it goes through the various
21 different sections, Section 2.1, wood cutting, carrying or
22 possessing a weapon or trap, specimen collecting, the
23 following camping activities which are limited other than
24 regular camping activities, auto disturbances.

25 2.17, aircraft and air delivery, (a)(3), delivery

1 or retrieval of a person or object by parachute, helicopter
2 or other airborne means. That to me implies that it is a
3 permissible activity within Yosemite National Park that the
4 Superintendent has not outright banned but has permitted as
5 long as there is a permit.

6 Go ahead.

7 MR. GERSON: Thank you, Judge.

8 THE COURT: Um-hmm.

9 MR. GERSON: I'm sorry. Is it better if I stand
10 at the podium?

11 THE COURT: Yeah. You can stand wherever you want
12 to stand, wherever you feel more comfortable, Mr. Gerson.

13 MR. GERSON: So, thank you, Judge. And I can
14 address both of those points because I think they're
15 interrelated.

16 First, to respond to the Government because I do
17 want to -- I do admit that -- that there were points in the
18 briefing, having now reread it, that I don't think I was as
19 clear as I possibly could have been.

20 I understand the Government's concern that this
21 does seem to be incongruous where we say, you know, the
22 underlying regulation is invalid as a matter of -- of rule
23 and comment -- notice and comment rule making because it
24 does not have this reasoned basis and purpose.

25 What I think that the briefing's not entirely

1 clear on is that we really are looking to the remedy. So,
2 in a civil lawsuit that we would bring under the APA in a
3 hypothetical situation, assuming we were within the statute
4 of limitations, we would say, you know, this entire thing is
5 out the window because of this lack of a reasoned statement
6 of basis and purpose, and that would affect all aircraft
7 regulations in the park.

8 THE COURT: So, you're talking about the CFR
9 itself. So, when we say the -- the provision, we're talking
10 about the -- we're talking about 217(a)(3).

11 So, you're going back to saying that the
12 regulation itself was not subject to proper rule making?

13 MR. GERSON: That's correct. And, so, that's our
14 first argument, the second one being that the part didn't
15 really apply under the Overton Park framework. That's --
16 that's a separate issue that I'll set aside for now.

17 So, with that in mind, Mr. Nunn is not in a
18 position to challenge any of the other aircraft regulations
19 that may be in -- in effect in the park, and this I think is
20 related to the permitting question. And, so, the -- the
21 issue is, you know, were Mr. Nunn bringing this in a civil
22 suit within the statute of limitations, he could have the
23 entire thing thrown out, not just about parachuting but
24 about, you know, gyrocopters or helicopters or hang gliders
25 or whatever else might land in the park, any other kind of

1 airborne. So, the entire regulation would be thrown out.
2 That's just not applicable to his case, and we don't make
3 the case that the park should now allow get aircraft or
4 helicopters or anything else without a permit. It only
5 applies to him in the context of base jumping. So, it's an
6 as-applied challenge, and it really goes to the remedy, and
7 the remedy is just the dismissal. So, we're not asking for
8 it to be overturned. It may be invalid, but it's invalid in
9 this case to the extent that it cannot serve as the basis
10 for prosecution. It's up to somebody else in a creative
11 litigation posture to come back and sue the park to get all
12 other aircraft allowed under this regulation, but that's not
13 Mr. Nunn's position. Our posture is just that he's being
14 prosecuted, and we just want the case dismissed. That's the
15 remedy, right?

16 THE COURT: Okay. So, if that's your challenge,
17 then what record -- because I'm supposed to look at the
18 administrative record, right, to determine whether or not it
19 was proper notice and comment and rule making. What is the
20 record then that you're claiming that is lacking?

21 MR. GERSON: So, going back to the Federal
22 Register, the initial -- and I believe they're cited in the
23 briefs. I'm sorry, I didn't -- didn't write them out, but
24 they're lengthy cites.

25 THE COURT: Um-hmm.

1 MR. GERSON: There was an initial call for notice
2 and comment rule making for public comment. The Park
3 incorporated that into the final rule making which I believe
4 was, if I remember correctly, June 30th of 1983 was when it
5 was finally promulgated. That rule making dealt
6 specifically -- it left open the question of pretty much
7 every kind of aircraft with the exception of hovercraft --
8 I'm not sure why -- or what was going on in 1983 that people
9 had hovercrafts -- and hang gliding were specifically
10 mentioned. And hang gliding comes into play with the permit
11 question that you just raised a minute ago.

12 So, that -- that entire administrative rule making
13 record, which, you know, the multiple Circuit Court
14 precedents from the Ninth Circuit, from the D.C. Circuit,
15 which is arguably the most learned in these administrative
16 law issues, saying that that is where the record needs to be
17 compiled, and it's very strict, and I believe the EPA case
18 and the pesticides -- again, I'll have to look at the cite,
19 but it's in our -- in our initial briefing where even with a
20 very strong scientific background, the EPA lost on that
21 because they had not shown why their research backed up the
22 rule that they promised -- or that they promulgated.

23 And, so, the -- the key here is that that is the
24 record. That is the administrative record.

25 THE COURT: Okay. And, now, let me go back

1 because I'm trying to get my history straight.

2 MR. GERSON: Yeah.

3 THE COURT: The initial regulations at some point
4 did not include the word "parachute", right? Parachute then
5 gets in, right, or then gets out or comes back in? It gets
6 changed over time, right?

7 MR. GERSON: So, my understanding is that the 1983
8 regulations --

9 THE COURT: Is the most -- is the most current.

10 MR. GERSON: -- is the most current. My
11 understanding is that that copied from a previous version
12 which I believe was published in the 1960's, maybe the early
13 1960's, that did also include the prohibition on
14 parachuting. And the Government in their brief raises the
15 issue that whether parachuting is -- whether base jumping
16 falls under parachuting, that's a matter of interpretation
17 up to the agency.

18 THE COURT: Right.

19 MR. GERSON: We don't disagree with that, and
20 that's been litigated in the Ninth Circuit, the Tenth
21 Circuit, I think the Fourth Circuit. That's really not --

22 THE COURT: That's the Alvers (phonetic) case, the
23 Ox (phonetic) case, that's correct.

24 MR. GERSON: That's correct. So, we really don't
25 argue that. It's clearly parachuting. We're not -- we're

1 intellectually honest on that point.

2 THE COURT: Um-hmm.

3 MR. GERSON: The fact that parachuting is in there
4 is not backed up by anything in the administrative record.
5 It never came in through notice and comment rule making. It
6 was never considered. And -- and really what it looks like
7 on its face is that the Park says, with the exception of
8 hang gliding, hovercraft -- again, it's a little bit
9 anomalous -- is they said we ban all aircraft except for
10 ones where you specifically ask for a permit, okay. And,
11 so, I think that comes to your question about the
12 Compendium, why can't you just ask for a permit.

13 THE COURT: Correct.

14 MR. GERSON: The case that's at issue there is
15 called the San Francisco Herring case. I can give you the
16 cite, but the -- the -- and that was against the Department
17 of the Interior having to do with Golden Gate National
18 Recreation Area, also the -- also the Park Service.

19 THE COURT: Is this a bicycle case?

20 MR. GERSON: It's called San Francisco Herring.

21 THE COURT: Okay.

22 MR. GERSON: And, so, the -- the rough facts of
23 the case was that there is a protected fisheries area
24 around Golden Gate National Recreation Area where fishing
25 was prohibited and fishermen were being cited and charged

1 with misdemeanors. So, again, very similar facts. And the
2 Ninth Circuit ruled that they had to go through the
3 administrative process first, but where no administrative
4 process existed, you were entitled to judicial review in the
5 Federal Court, which I think is where we're at now. And the
6 reasoning there was that the San Francisco -- excuse me --
7 San Francisco Herring Fishermen's Association, the
8 plaintiffs in that case, you know, successfully pled that
9 their efforts to negotiate with the National Park Service
10 had effectively been stonewalled for many many years. And,
11 so, they had oral discussions with them. They had meetings
12 with them, and basically the Park Service was so
13 intransigent they had what they called an enforcement order.
14 I suppose it was a park policy that was published, and the
15 Ninth Circuit held that that was sufficient to demonstrate
16 final agency action. They no longer needed to go through
17 any more appeals in the administrative realm and could,
18 instead, bring it to Federal Court.

19 And, so, we're looking at exactly the same thing,
20 and there's, I think, sufficient documentation in our
21 initial motion to dismiss that shows that the enforcement
22 procedures in Yosemite have been extremely strict for an
23 extremely long time, and those enforcement procedures --
24 again, this -- this falls under the Overton Park framework,
25 which is a little bit of a different discussion, but they

1 were made and there's documentary evidence where Bill Wendt
2 (phonetic), who was the Chief Ranger at the time, says, you
3 know, I made the permit system. I can take it away. I
4 don't like these people. They're hippies. They're long
5 haired, you know, free spirits or whatever it was, which is
6 kind of the definition of arbitrary and capricious.

7 And, so, my understanding, especially speaking to
8 people in the base jumping community is that, you know, you
9 can go through the Compendium, and you can apply for a
10 permit for your helicopter, for your bush plane, for your
11 drone, for whatever other aircraft you want to, but the
12 reality is is that you're never going to get one for base
13 jumping, right. And, so, you know, and if you look at the
14 -- I believe we attached as an exhibit to our initial
15 pleading the permitting process for base -- or sorry, excuse
16 me. Excuse me -- the permitting process for hang gliding --

17 THE COURT: Hang gliding, um-hmm.

18 MR. GERSON: Yes. I'm sorry -- you know, and it
19 goes through any number of environmental impact studies. It
20 has, you know, pilot qualifications. It has certain number
21 of jumps per day, and all -- these are all things that are
22 well within the Park's authority to regulate, but that's
23 never been available for base jumpers, and that really has
24 to go back to what is final agency action, a decision by the
25 chief ranger at the time, to say, No more. It's enough.

1 We're never going to do this, and then that's backed up for
2 -- for nearly four decades of enforcement where we have, you
3 know, really high profile cases of people being involved in
4 fatal accidents because they were jumping after dark,
5 because, you know, the one guy was trying to swim across the
6 river, and this was all to evade law enforcement.

7 And at any point, you know, somebody could have opened
8 a dialogue, and I don't place the blame entirely on the --
9 on the Park Service, but it's my understanding speaking to
10 people in the base jumping community that they thought this
11 was a futile effort. You know, and the Park Service also
12 could have come back and said, Hey, this is getting a little
13 out of hand. Let's figure out a way to do this better
14 rather than straight up strict enforcement.

15 And, so, I think under the San Francisco Herring
16 test from the Ninth Circuit, that satisfies final agency
17 action. So, while the Compendium may have guidance that
18 you're allowed to apply for a permit for any of these other
19 things, you know, I mean, presumably you could have a
20 commercial plain old sky diving where you land in the park
21 or maybe you're in the back country and have your supplies
22 air dropped to you by parachute. These may be things that
23 are subject to a permit. My understanding is that the
24 reality of it, the facts of this case over many many
25 decades, is that the final agency action has always been no

1 to base jumping, notwithstanding other permits for -- for
2 aircraft.

3 THE COURT: Okay. So, then my next question is is
4 your argument that the -- this particular provision, Section
5 217, okay, that any time there's advances in any type of
6 technology, that the fact that those weren't discussed at
7 the time of the implementation, that, therefore, it lacks
8 that -- that necessary notice and -- and to be able to get
9 -- I mean, in other words, at the time this was adopted in
10 '83, I don't know how prolific base jumping was, but then
11 doesn't it really come down to being an interpretation of
12 the particular provision that it includes base jumping. And
13 then, of course, I mean, that's what Alvers says, right?
14 Alvers says, yep, it does include base jumping now. We do
15 say. So, isn't it more of an interpretation of the Park
16 Services that it includes it?

17 MR. GERSON: I think as a -- as a comment on
18 administrative regulations generally, I think there's no
19 discussion that agencies are welcome to interpret things as
20 they see fit, with -- with certain limits, as long as it
21 doesn't create -- I think the -- the test is whether it's a
22 new right or obligation.

23 THE COURT: Um-hmm.

24 MR. GERSON: But, certainly, a parachute is a
25 parachute, and base jumpers use a parachute. We don't argue

1 that fact. So, I think the Park Service is well within its
2 rights to interpret that as falling under the prohibition.
3 Our position is that the prohibition itself is invalid for
4 lack of reasoned rule making at the very beginning. And,
5 again, this is where it gets a little bit tricky, and I
6 apologize to the Court and the Government if the briefing
7 wasn't clear on this. Our position is not that we're trying
8 to throw out the whole regulation, which would happen in a
9 civil lawsuit against the Park Service, really, just that we
10 want the remedy of dismissal because he's being prosecuted
11 under an invalid statute.

12 THE COURT: All right. And I still don't
13 understand why he can't apply for the permit and then
14 challenge the denial of the permit. What is -- let me ask
15 you this. When I apply for a permit and I'm denied a
16 permit, I'm assuming there has to be a certain due process.
17 Otherwise, if -- in other words, if your statement is
18 National Park Service does not permit base jumping in
19 Yosemite even though they say it gets a permit, it never
20 ever granted a permit, then I think you have an argument
21 that it -- I mean, it is an act in futility and the fact
22 that they don't have a permitting system and never ever
23 grant a permit and never have to answer to that, I don't
24 know what the appeals process is or what the remedy is when
25 someone's denied a permit, what the next challenge is, but

1 wouldn't that be the -- the more appropriate place to raise
2 an arbitrary and capricious argument as to whether or not
3 the Agency informally have adopted an action contrary to
4 what the CFR says, unless a permit is obtained, which to me
5 implies that it's not about not prohibition but whether one
6 that needs to be permitted.

7 And -- and then the -- then if they say in
8 Yosemite, sort of like there's the one case with the bear
9 cans, right? I don't know if you're familiar with that one,
10 the Sierra -- the bear cans issue when they stopped the soft
11 pack bear cans, same type of thing, right. The Agency says
12 we're not going to have it, but we have to make -- need to
13 make these decisions based on certain rational reasons. You
14 know, it can't just be done arbitrarily and capriciously.

15 Do you see what I'm saying? I guess I'm -- I'm
16 trying to figure out why we're going after the adoption all
17 the way back in 1985 instead of the implementation or the
18 enforcement of it if your argument is that they don't ever
19 permit it. But you don't -- but no one's asking for a
20 permit to be denied and then to challenge the denial of
21 those permits.

22 MR. GERSON: Right. So, I think that goes -- if
23 I'm understanding correctly -- and stop me if I -- if I'm
24 not. I think that goes to the second argument that we
25 raised, which is under the Overton Park framework, which is

1 that even if we assume that Section 2.17 as promulgated
2 correctly with the requisite notice and comment rule making
3 reason, the way that it's implemented by law enforcement is,
4 again, in itself arbitrary and capricious because the
5 reasoning for it is we don't like these people. There's
6 animus towards the sport, not that it has some impact on
7 things that the Park is meant to preserve, so, not that it
8 has an impact on wildlife or an impact on traffic or things
9 that are well within the Park's, you know, organic statute
10 to regulate. And that -- that, again, it goes right back to
11 the permitting issue is that the -- the enforcement priority
12 at the time -- and I believe it's cited in -- in several of
13 the documents that we cite, as well as in the documentary
14 movie that was made about it where there's an interview
15 given this first Mr. Wendt, who was the previous ranger --

16 THE COURT: Um-hmm.

17 MR. GERSON: -- where he just says, I don't like
18 it, and I'm taking the permits away, and that's it, right,
19 which is the definition of arbitrary and capricious.

20 So, that -- in that situation, you're a step
21 removed from whether or not the -- the permanent -- or the
22 regulation itself is valid. We assume that it is in that
23 case. But how it is applied as an enforcement priority as
24 an internal agency decision also needs to be supported by
25 valid reasoning.

1 THE COURT: And, doesn't the -- okay. So, your
2 document, like your evidence that you're alleging, right, we
3 don't really have any of that evidence here. I can't take
4 judicial notice of something that a ranger supposedly said
5 to a newspaper article. You know what I mean?

6 The -- so, but if you were denied a permit and
7 those bases were stated on that permit, right, the denial,
8 you then have a basis to then challenge, you know, to the
9 extent they alleged, you know, inherent dangerousness, you
10 know what I mean, or whatever their basis is. You know what
11 I mean? I understand what you're saying, and I think they
12 have to come up with reasons as to why they would deny it if
13 the -- the Compendium appears to say it shall be granted as
14 long as you get a permit. I mean, we now have free solo
15 going on in the Park. However, we know that in the, you
16 know, wilderness areas you need to get permitting now --

17 MR. GERSON: Right.

18 THE COURT: -- to rock climb. You know what I
19 mean?

20 MR. GERSON: Sure.

21 THE COURT: So, there's certain restrictions that
22 are being implemented. If they deny, then those permits, I
23 assume there's a mechanism for somebody to challenge the
24 denial. You know what I mean? I -- I'm -- I know where
25 you're going, but I just don't know we're getting there the

1 right way.

2 MR. GERSON: Right. And I -- and I think -- I
3 think this actually came up at our -- at our previous
4 hearing because I do remember you had asked about the
5 appeals process then.

6 THE COURT: Um-hmm.

7 MR. GERSON: And I unfortunately don't have more
8 information on that now. That may be a better question --

9 THE COURT: Oh, I'm going to ask the Government.

10 MR. GERSON: -- for the Government.

11 THE COURT: -- because I think the Government
12 should -- better know what the appeals process is for denial
13 of a permit.

14 MR. GERSON: Right, but I think --

15 THE COURT: To the extent they're alleging there
16 needs to be exhaustion, how does one exhaust?

17 MR. GERSON: Right. And I think -- I think your
18 question is well founded. And, so, in the hypothetical you
19 give, sure, if there was a -- if there was a process saying,
20 you know, wilderness permits are a good example. There's a
21 very clear process for applying for them, and you can go out
22 in the wilderness.

23 If there was a process for applying for a base
24 jumping permit or a rock climbing permit and it was denied,
25 you know, the denial had a reason that was like, you know,

1 protecting Peregrine Falcons or something that's -- that's
2 well within the realm of the Park's regulatory pattern --

3 THE COURT: Right, reasonable.

4 MR. GERSON: Right.

5 THE COURT: There's a reason --

6 MR. GERSON: -- versus I don't like you, you know,
7 then you would appeal it, and it would be the exhaustion of
8 then you would have your review in Federal Court.

9 THE COURT: Right.

10 MR. GERSON: You would be entitled to that, and
11 that's very clear.

12 THE COURT: I guess that's what I'm trying to
13 figure out, what the agency action here is, because the CFR
14 doesn't just apply here in Yosemite National Park. Do you
15 see what I'm saying? I guess what I'm trying to figure out
16 is what is the agency action that is arbitrary and
17 capricious.

18 MR. GERSON: Right. I think --

19 THE COURT: You're saying the adoption of the
20 rule. So, it's step three. It's -- I guess there's the
21 three part that, you know, as to where you challenge the
22 APA --

23 MR. GERSON: Right. I think --

24 THE COURT: -- issues.

25 MR. GERSON: I mean, I think the Park framework is

1 -- does give some guidance on that because comparing the
2 National Park Service to the Bureau of Land Management,
3 which does allow base jumping or I know Shenandoah National
4 Park allows base jumping. So, again, that's an enforcement
5 decision made internally within those -- I hate to say
6 subagencies. It's inarticulate -- but subagencies of the
7 Department of the Interior.

8 You know, so -- so, maybe they have a good reason
9 to allow it or disallow it, but in this case, the
10 enforcement priority was never based on any real reason. It
11 was based on animus towards the sport.

12 And in terms of -- of exhaustion, I think there's
13 good case law and good authority from the Ninth Circuit that
14 you -- you know, there is no mechanism for that, and you can
15 effectively skip over the exhaustion requirement and go
16 straight to review because we've had this final agency
17 action which was the decision not to allow it, decision to
18 revoke a rudimentary early permit system that only existed
19 for a few months and all of that on the basis of just
20 generally dislike for the sport.

21 THE COURT: But I don't think they've withdraw the
22 permitting. That's where I think had they withdrawn the
23 permitting, then I would say that's the agency action
24 they're challenging, the withdrawing of the permitting,
25 right?

1 MR. GERSON: Well, I think that the record on that
2 would always be, you know, unless the -- unless the Park
3 articulated a separate permitting procedure for every kind
4 of aircraft, so, a helicopter permit, a gyrocopter permit, a
5 jet plane permit, a base jumping permit, but really what
6 they would do is reserve -- you know, everything is
7 prohibited until you get a permit of any kind.

8 THE COURT: Well, but see, they do do that with --
9 that's why in -- when you talk about the different aircraft,
10 under 36 CFR 716, which is the Yosemite powerless flight
11 requires a permit for the Superintendent. Powerless flight
12 not being base jumping obviously because the Ninth has said
13 it doesn't include base jumping.

14 But they are -- they're recognizing in the
15 Compendium itself also that that -- that does fall within
16 716, and they do state that 36 CFR 217 aircraft and air
17 delivery (a) (1), not (a) (3), but (a) (1), areas designated
18 for operating and using aircraft are provided for in Section
19 7.16(c).

20 So, again, they are recognizing other aircraft.
21 That's why I'm saying I -- to me, it's still recognizing
22 that there's a permitting process available for 217(a) (3),
23 in addition, a different one for (a) (1) and those that fall
24 within 36 CFR 716.

25 MR. GERSON: And I think the distinction is -- is

1 -- or maybe not the distinction but the -- the illustrative
2 point that has to do with hang gliding, is that clearly
3 permits have been issued for that. It doesn't fall within
4 any of the --

5 THE COURT: So, how --

6 MR. GERSON: -- on this list as powerless flight.
7 I'm not sure.

8 THE COURT: How many people applied for a permit
9 for base jumping and were denied? Do you know?

10 MR. GERSON: I do not know. But I think that the
11 -- the general assumption is that you would always be
12 denied, and based on the documentary record, which, again, I
13 don't know if the Court will take judicial notice of, but it
14 does -- it is instructive -- is that the -- the position was
15 always that it would be denied.

16 THE COURT: Okay. I get it. I mean, I've read
17 some of the Law Review articles on the issue, and -- and I
18 get the poll. You know, it's preservation of the parks and
19 then recreation and how the two intertwine and whether it's
20 more impactful to the environment than some other sports
21 that are permitted within the park. I mean, I get your
22 arguments.

23 MR. GERSON: Well, but I don't think any of those
24 were -- and, again, I haven't read the -- any Law Review
25 articles. I'm actually not even aware that this was a topic

1 that --

2 THE COURT: Yeah, it is.

3 MR. GERSON: -- reached the level of academia.

4 THE COURT: It's a very high level topic of
5 conversation among the youth apparently.

6 MR. GERSON: So, but I -- you know, I think that
7 the hang gliding or rock climbing permits deal with many of
8 the same issues, and the park has -- has done the right
9 thing and undertaken a huge amount of environmental impact
10 studies, and that's very different than what has happened.
11 At least the record we can divine is that it was just denied
12 on the basis of dislike for the sport or dislike for the
13 participants or, you know, not socially acceptable at the
14 time or something like this, which is -- which is really the
15 definition of arbitrary and capricious over the Overton Park
16 framework.

17 THE COURT: Okay. All right. Thank you.

18 MR. GERSON: Thank you.

19 THE COURT: All right. Mr. Butland.

20 MR. BUTLAND: Thank you, your Honor.

21 THE COURT: First, I'm dying to know how does one
22 appeal the denial of a permit. Is there a mechanism to do
23 so?

24 MR. BUTLAND: Your Honor, I don't know if there is
25 a -- if there's an internal mechanism, but I -- one of the

1 things -- and maybe this would help answer the question from
2 a more general standpoint. So, Mr. Nunn is making an
3 argument under the APA. He's challenging regulation. I
4 think a question you raised is a very good one. To have a
5 final agency -- or to -- to do an APA challenge, you have to
6 have a final agency action. You can't just say, well they -
7 - you know, we thought that maybe we would have been denied
8 and, so, therefore, that's the final agency action.

9 Now, I heard in the argument -- I think there are
10 two different ones they're pointing to. One is the adoption
11 of the regulation itself. The other is when this ranger
12 said he didn't let -- I'll paraphrase a little bit somewhat
13 humorously -- but "I don't like hippies." And that -- you
14 know, that occurred, if I remember their briefing correctly,
15 sometime in the early 1990's.

16 If those are the two agency actions, the biggest
17 problem they have here is the statute of limitations. And
18 -- you know, and that's where I think their argument
19 completely falls apart. Now, how might they get around
20 that? Well, I think you provided one possible way. You
21 have some sort of interactive dialogue with the National
22 Park Service now. When they say no, then you've actually
23 got something that you can challenge within the six years.
24 But that's what I think they're -- but that's where I think
25 the problem is is that, you know, they're trying to create

1 what they call an as applied procedural challenge. That
2 doesn't exist under agency law. You can't do an as applied
3 challenge. You either have a procedural challenge or you
4 have a substantive challenge, one subset of substantive
5 being as applied.

6 So, and that's where the six-year problem is. And
7 I think especially in this case, it's even a starker problem
8 because Mr. Nunn was convicted of the exact same offense in
9 1999. So, that was another opportunity for him to raise
10 this exact issue, and he didn't do it. We're now 20 years
11 away from that, more than 20 years. At some -- the reason
12 why our statute of limitations exists as -- as Wind River
13 said is that at some point the Government has an interest in
14 finality. We can't keep revisiting the same things.

15 So, I -- I think then to just sort of sum up your
16 question as to what's the appeal process, well, I think it
17 -- it may depend a little bit on what exactly they're coming
18 to in terms of the approach. But I think that the air --
19 the hang gliding is a great example of how this could work.
20 You know, hang gliding we saw in -- in their brief -- it's
21 Exhibit A that has all the -- that has all the hang gliding
22 documents. There are almost 30 pages here, and what's very
23 clear is that the hang glider -- there's a hang glider's
24 association basically that had an interactive discussion
25 with the park, and they came up with a proposal to allow

1 hang gliding. So, what does that look like? Well, it's
2 only two hours during the day at the very beginning. Why
3 did they do that? Well, one of the main reasons is to avoid
4 interference with aircraft because helicopters come in
5 periodically, and if you have a hang glider and a
6 helicopter, we kind of know how it ends.

7 So, you know, you can do that. There's only a
8 certain number of permits that can be granted. There's only
9 one jump off point, Glacier Point. That's the only place
10 that you can actually hang glide from. There is a
11 designated landing point in a meadow, and it's -- if I
12 remember correctly, it's about 150 by 50 feet. So -- and
13 then there's a very specific route they have to go, which is
14 basically three-quarters of a circle, and on top of all
15 that, it has to be under the auspices of this hang glider's
16 association.

17 Now, if that was what the base jumping community
18 did, if they came with a really solid proposal and said --
19 basically like the hang gliders did and said, Here, we want
20 to jump off from this point. We want to do it at this hour.
21 We want the landing spot to be here. Here's how we're going
22 to protect. You know, like, for example, in El Capitan, the
23 biggest concern I would think -- and I think the National
24 Park would agree -- is there are mountain climbers on it.
25 Well, what happens if somebody misjudges and they fall into

1 the -- you know, they fall into the rock face, which I
2 believe is what happened to Mr. Nunn?

3 You know, but if there was that iterative proposal
4 and then the National Park Service simply said, No, you
5 know, we have this proposal but we're not going to give it
6 to you anyway, I think that would be subject to a potential
7 APA challenge. Now, may still lose on the merits depending
8 on what the National Park Service says, but that's sort of
9 the process that I think we should be looking for and which
10 didn't occur here. And -- and this challenge should have
11 been either brought through that or, at minimum, back in
12 1999 when he was convicted of the -- when he was charged
13 with this before. That would have been a time to raise this
14 issue as well. The six-year statute of limitations bars the
15 claim.

16 I want to add one other point too, which is that I
17 think, in a way, Mr. Nunn kind of has the idea backwards in
18 terms of where the findings need to be. If you look at the
19 regulation, it says -- and I'm sure you're sick of looking
20 at it, but I will --

21 THE COURT: Hold on. Let me get it.

22 MR. BUTLAND: But -- but it says, you know,
23 217(a) (3), aircraft and air delivery:

24 "The following are prohibited:

25 Delivering or retrieving a person by

1 object or parachute, helicopter or other
2 airborne means except in emergencies or
3 except pursuant to a permit."

4 The point is the presumption is that it's illegal
5 unless you can show either an emergency or that you got a
6 permit. If you didn't do that, that's game over. And when
7 you look at hang gliding as the example, you -- you
8 probably, with the 29 pages that they attached of hang
9 gliding, with 60 different findings as to whether hang
10 gliding would impact certain things, this particular plan,
11 that's what the Government has to go through if they're
12 going to decide whether to grant a permit. It's not simply,
13 Hey, I want to base jump.

14 Well, the National Park Service can't really
15 evaluate what the impact is on that until they know the
16 specifics, and that's why the permitting process here and
17 the -- and the interactive process that -- that I brought up
18 earlier, that's why it's so important, because, you know,
19 the -- the -- I guess maybe the way to put it is comity is a
20 two-way street. The person applying for the permit has to
21 have respect for the National Park Service to give them the
22 specifics they need to make the decision. The National Park
23 Service, meanwhile, has to make findings within the
24 regulations and statutes.

25 And, so, I -- I think the -- just to reiterate, I

1 think the big problem here is that they're actually kind of
2 reversing the way that it should go. The default position
3 should be you don't get to deliver anything. You don't get
4 to fly helicopters into the Park. You don't get to jump
5 through parachutes. You don't get to -- whatever technology
6 they happen to invent as recreation, the presumption is you
7 can't do that unless you can provide information to the Park
8 to let them conclude it's not going to have those impacts.

9 THE COURT: And they can issue a permit.

10 MR. BUTLAND: And then they can issue a permit or
11 if they don't, when there is a showing that, look, this will
12 not impact the wildlife, this is completely safe, it won't,
13 you know, interfere with airspace, you know, for helicopters
14 that come in or hang gliders that are in the area, something
15 like that, you know, if you can show all of that and the
16 Department of the Interior still says no, well, then there
17 might be something to discuss in terms of lack of reasoned
18 decision making as a procedural challenge. But, as it
19 stands right now, the six-year limitations period has run.
20 It ran a very long time ago, and they can't really invent
21 it --

22 THE COURT: But does -- let me ask you that --

23 MR. BUTLAND: Yeah, sure.

24 THE COURT: -- because I have a question on the
25 six-year statute of limitations. It's a civil statute, the

1 six-year statute of limitations. This is a criminal case.
2 So, is there -- is there not an -- a mechanism to -- where
3 that six-year statute is then triggered when it becomes --
4 when it is impacted in terms of resulting in a criminal
5 offense? In other words, the six-year statute of
6 limitations is to challenge civilly, right, the -- the --
7 the adoption, you know what I mean, for an agency, a group
8 to come in, you know, whether if I'm -- if I'm drafting
9 something with timber, maybe I have a timber group that
10 comes in and says, No, we don't like this. We want to be
11 able to challenge this, and we go into District Court and we
12 file a suit as an entity to challenge that provision.

13 This is something a little bit different here,
14 don't you think? I mean, the --

15 MR. BUTLAND: Well, you know, your Honor, I was
16 told early in my career that judges don't care what your
17 opinion is. They care about what other judges' opinions
18 are. And, so, I would refer you to what the Ninth Circuit
19 has already held on this topic. If we look at U.S. v.
20 Backland or U.S. v. Lowrey, both bases were criminal cases.

21 THE COURT: Right, but there was an exhaustion --
22 there was an -- there was an exhaustion. That's why I say
23 isn't it the permitting? Without the permitting, there's --
24 there's a mechanism that there has to be some kind of agency
25 action that then gives you the right to challenge it

1 criminally. You still have to have some sort of a precursor
2 to that.

3 MR. BUTLAND: Yes, your Honor. I think if I could
4 slightly rephrase it a little bit, there has to be a final
5 agency action that is challenged. In the case of Backland,
6 if I recall correctly, it was a previous finding as to
7 whether somebody was using the land for proper use. For
8 Lowery, it was a question of whether she had an exemption
9 for -- some sort of exemption for American Indian tribes.

10 There was a very identifiable final agency action
11 that they -- that the Defendant identified, and the Ninth
12 Circuit said in both instances, Well, that was more than six
13 years ago. You lose.

14 So, I would apply it to the same thing here. The
15 final agency action that they're identifying is either the
16 adoption in the federal -- or printing in the Federal
17 Register, which Ninth Circuit has been very clear that
18 that's what starts the six-year statute of limitations or
19 this -- you know, or you have, you know, a rogue park ranger
20 who hates hippies in the 1990's.

21 Well, in either case, if those are the agency
22 actions, then the six-year statute of limitations has run.
23 If they can identify a final agency action that occurred
24 within the previous six years, we might be having a
25 different discussion. But they -- but they haven't -- but

1 they haven't done it. And, certainly, if the -- if they
2 referenced something in the previous six years, it wouldn't
3 be adoption of the regulation. It would have to be
4 something else. It would have to be -- you know, it would
5 have to be denial of a permit as one example.

6 THE COURT: Or if the superintendent in their
7 Compendium decided no leash jumping in Yosemite National
8 Park.

9 MR. BUTLAND: Yeah. I mean, I think if --

10 THE COURT: A flat out ban, contrary to what the
11 CFR says, unless in emergencies and/or permit.

12 MR. BUTLAND: I think if they specifically --
13 yeah, if they -- if they alter the regulation in a way which
14 I think the -- the Compendium in this case is -- as your
15 Honor has probably noted, is basically identical to the
16 regulation.

17 THE COURT: Um-hmm.

18 MR. BUTLAND: So, if they were to change the
19 regulation in some way, either by, you know, creating a
20 permitting process that base jumpers didn't like because
21 they didn't think it was broad enough or they just -- you
22 know, the flat out said, you know, we -- we just -- no
23 matter what the iterative process is, no matter what they
24 present us with, there is absolutely nothing, period, that
25 they can show us that will make us change our minds, then

1 maybe we have a different discussion. But it's -- but I
2 think the important thing is that there has to be some kind
3 of iterative process for there to be a final agency action
4 within the six years, and hang gliding I think, ironically,
5 is the best example for us in showing how that's supposed to
6 work.

7 THE COURT: Um-hmm.

8 MR. BUTLAND: I actually don't think it helps the
9 Defendant's side at all in that regard.

10 THE COURT: Okay. I guess I -- my concern is I'm
11 trying to figure out what is the administrative record I'm
12 supposed to be reviewing. Do you see what I'm saying? I --
13 Mr. Gerson, that's what I'm asking you I guess. What is the
14 agency? My understanding is the focal point for my review
15 is the administrative record already in existence, not a new
16 record made initially in the reviewing court.

17 So, the administrative record you're saying is the
18 original adoption of the CFR So, you are in essence
19 challenging the original provision, right, Section 217, when
20 adopted?

21 MR. GERSON: That's correct, your Honor. So, our
22 position would be that -- under our first line of attack
23 would be that the adoption and the promulgation of Section
24 2.17 was incorrect as a matter of notice and comment rule
25 making because it did not have this statement of basis and

1 purpose, reasoned analysis about aircraft generally.

2 You know, and I think -- I think the Government
3 raises an interesting question, which is whether or not the
4 Government needs to articulate every single reason or
5 whether they can reserve that power for future internal
6 decision making, which is -- which is in a certain sense
7 what they did is that they said everything is banned until
8 you get a permit. We don't -- we don't disagree with that
9 reading, right, but it doesn't give a reason as to why they
10 would even make that decision, you know.

11 So, if they were to say something like, you know,
12 planes over a certain tonnage are prohibited and everybody
13 else needs a permit, it would kind of make more sense
14 because it would have to do with the regulation and the
15 preservation of the Park.

16 Moving on from that is our second line of attack
17 which falls under Overton Park, which is that, you know,
18 this power that the agency has reserved for itself to then
19 issue permits and to make internal decisions is -- is also
20 flawed, and that has to do with this kind of animus towards
21 the sport in the early 1980's.

22 The question I would ask -- and I don't mean to be
23 flippant, but it's a bit of a rhetorical question, is -- is
24 why did hang gliding get a foot in the door but base jumping
25 didn't. And, you know, the Government --

1 THE COURT: Did base jumping ask?

2 MR. GERSON: That's -- that's one view of it.

3 But, I mean, it could be that base jumping was -- also had
4 this very negative view from Park administration at the time
5 and was effectively doomed, because, remember, the Park --
6 the Park did issue permits for base jumping at least for
7 several months when it was kind of a new sport, and then it
8 decided, This is too much. We're not going to do it
9 anymore.

10 You know, so, you know, you -- even both of those,
11 starting and stopping the permits, you could construe as --
12 as violating Overton Park. And, so, there is a real
13 question about how they issue the permits, what, you know,
14 criteria they use to assess them. I think the hang gliding
15 does go through things that are well within the -- the
16 Park's ability to regulate, and it's a very well thought out
17 regulation I think.

18 THE COURT: Um-hmm.

19 MR. GERSON: You know, the question is you know
20 why hang glider -- excuse me -- base jumpers never invited
21 -- or never felt that they had to do that, and I think they
22 were deterred at the very beginning because of this hostile
23 enforcement, and the hostile enforcement position has gone
24 on for many many years, despite fatalities, despite really
25 kind of Herculean efforts to avoid rangers despite negative

1 press. You know, the Park's position has always been no
2 base jumping. It never even indicated that it would be
3 willing to reconsider it or to open a permitting process.
4 You know, and that's -- that's just the way the history has
5 played out, whether it's judicial notice, record, whatever
6 else. It's -- it's -- it's the facts is that the Park has
7 always had a hostile enforcement position.

8 THE COURT: And I guess that's an assertion,
9 right? I mean, I don't know that -- you're referring to it
10 as a fact, but without there being applications for the
11 permit and an opportunity to sit down with the Park and try
12 to discuss that going forward, I don't know that you can
13 take what somebody said how many years ago and with a broad
14 brush say that that still happens to be the -- the situation
15 in the Park today.

16 MR. GERSON: I mean, I agree. There -- there may
17 be some onus on the -- on the base jumping community to
18 develop that record.

19 THE COURT: To develop that report.

20 MR. GERSON: But -- but I think that my
21 discussions with -- with particularly authors in base
22 jumping, who are not parties to this case but people who
23 have consulted on this is that it was effectively pointless
24 to try and approach the Park about this. They always knew
25 they were going to be rebuffed just because of this hostile

1 enforcement environment.

2 THE COURT: I think that's where you get your
3 record, right? That's -- that's where you get your ability
4 to then challenge that agency action, because I -- I go back
5 to I'm not sure what the -- what is the -- as a reviewing
6 court, what is the right -- you want me -- you want me to
7 piece out from the CFR just that provision and -- and not
8 find the entirety of -- of it improperly done for notice and
9 rule making but just as applied to Mr. Nunn. Do you see
10 what I'm saying?

11 MR. GERSON: Well, I think that -- I think that as
12 a procedural challenge, you do have to in some sense find
13 the entirety of 2.17 is invalid.

14 THE COURT: Right.

15 MR. GERSON: But the remedy is not that we open up
16 the park to every kind of aircraft. The remedy is just that
17 this case is dismissed. That's the distinction that I'm
18 drawing, right, is that it's not -- it's not -- beyond this
19 case, I don't think it has broad applications. That may be
20 a -- a Federal Court's type question of academic interest,
21 but in this case, we're just asking for a very narrow
22 remedy.

23 One thing I would also just like to respond to is
24 the -- the statute of limitations question.

25 THE COURT: Um-hmm.

1 MR. GERSON: And I have serious concerns with
2 that. You know, first, just as a -- as a textual matter,
3 it's very clear in the statute it says civil. You know, it
4 doesn't require a whole lot of reading into it, and I think
5 that that's -- your position is correct is that if somebody
6 comes -- let's say I'm a drug company and then I watch the
7 FDA very closely and they publish something. I have six
8 years to then challenge that through whatever process,
9 whether it be Federal Court or administrative review. And
10 then after that, the interest of finality supercedes that.
11 I have no disagreement with that.

12 But as a criminal matter, I find it very
13 troubling, and I think -- I cited to a case Adamos Wrecking,
14 where there was a dissent in the Supreme Court that kind of
15 skirted the issue but really raised the same constitutional
16 question, and, you know, the first question is -- is one
17 that's largely common sense, which is if I commit a crime
18 and I can raise any number of defenses and lose and then I
19 commit a crime again, am I precluded from raising other
20 defenses. You know, so if I rob a bank, you know, and I
21 lose at trial and I go to jail, I get out of jail and I rob
22 another bank, is anything I said in the first trial
23 affected? No. I'm still entitled to the full compliment of
24 -- of defenses, including collateral attack. And in a -- in
25 a statute that was set forth by Congress, that collateral

1 attack would be subject to rational basis review, and
2 there's -- there's one working its way through the Ninth
3 Circuit right now on exactly that question having to do with
4 immigration statutes, rational basis. Rational basis review
5 not being very favorable, that's a different, again,
6 academic discussion.

7 The -- the --

8 THE COURT: Which review would you like, strict
9 scrutiny?

10 MR. GERSON: So, the -- the second -- you know,
11 the kind of complimentary part of that is that as a
12 delegation question, which is maybe less common sense, it
13 really raises the question of whether Congress in enacting
14 the Organic Act that empowers the Park Service and the
15 Department of the Interior, also gave them the power to
16 restrict what are effectively due process rights.

17 And, so, does the Park Service, can they say, yes,
18 this administrative regulation has criminal penalties? You
19 could spend six months in jail and be subject to a fine, but
20 also you're not allowed to raise certain things, you know,
21 after. And that was really the -- the constitutional
22 question I think they get at in Adamos Wrecking, which is
23 largely unanswered but -- but raised enough eyebrows that it
24 made it into the dissent as worth watching.

25 And, so, I would be very cautious. Like, I find

1 it -- I find it very difficult to read into the six-year
2 statute of limitations in this context. If -- if it was a
3 civil lawsuit, it clearly applies. In this case, I think
4 Mr. Nunn is entitled to raise the full range of whatever
5 defenses he wishes to -- you know, the wisdom and the
6 success of them notwithstanding, but he's entitled to raise
7 those, and I think that is a -- a real question of due
8 process and delegation.

9 THE COURT: And I -- I see that. I also see, you
10 know, challenging the provision on vagueness grounds, you
11 know what I mean, that you -- a facial challenge, but that's
12 already been decided by Alvers, right, because he could
13 argue, I didn't know that that included based jumping. I
14 mean, that -- that's what I think his argument would be, to
15 -- you know, which is what other people's arguments were,
16 right.

17 MR. GERSON: Right.

18 THE COURT: I didn't think it included that. So,
19 all right. I get that.

20 MR. BUTLAND: Your Honor, may I respond to one
21 point?

22 THE COURT: Um-hmm.

23 MR. BUTLAND: It would regard whether the statute
24 of limitations should apply, and I realize that the horse
25 may be dead and I'm still kicking it, but I, nonetheless,

1 want to make sure I -- I do a complete record.

2 So, you know, the -- the -- this is to me a very
3 radical argument. Essentially, the argument is that the
4 Court should be able to disregard a statute of limitations
5 in criminal cases for this very specific mechanism where the
6 Government waived sovereign immunity, opened itself up to
7 suit under the Administrative Procedure Act, and -- but you
8 can just ignore the six-year limitations period.

9 And this might be a good academic discussion as to
10 whether it -- you know, whether this creates problems in
11 administrative law or -- or something like that, but, again,
12 I go back to the Ninth Circuit has already talked about
13 this, and I would -- if I could just read a couple of quotes
14 from the cases just so -- you know, just so that you don't
15 think that I'm mischaracterizing anything, if we go to U.S.
16 v. Backland on page -- page 1001 --

17 THE COURT: Hold on.

18 MR. BUTLAND: Sure.

19 THE COURT: Okay. Go ahead.

20 MR. BUTLAND: Okay. And, so, on page 1001, it
21 says -- and I -- I don't know where -- hopefully you'll be
22 able to find it in your copy quickly, but:

23 "The APA affords a person in
24 Backland's position at least two options
25 for obtaining judicial review of the

1 disputed agency action. He may file
2 suit in Federal District Court under the
3 APA or he may challenge the agency's
4 decision in a subsequent criminal
5 proceeding. In either case, he must act
6 within the six-year time limit."

7 And then on page 999 of the same decision, it --
8 you know, the Ninth Circuit prohibited one defendant from
9 contesting a prior agency action based on the six-year
10 limitations period, and it phrased it as follows:

11 "He may not now circumvent the
12 APA's exhaustion requirement by
13 collaterally attacking the agency
14 decision as a defense in this criminal
15 proceeding."

16 Backland rejected the due process argument that's
17 being made right now. Exact same thing in U.S. v. Lowery
18 from 2008, and if I could just read one more quote into the
19 record, and then I will be --

20 THE COURT: Yeah, wait a minute. There was -- I
21 remember, though, in Backland, there was -- the other one
22 was timely because there was other action taken by the
23 individual, correct?

24 MR. BUTLAND: Correct, your Honor, yeah. Backland
25 involved two different defendants and --

1 THE COURT: That's why I'm saying I think there
2 needs to be something. We need a permit. We need something
3 is what I guess I -- that exhaustion requirement I think is
4 -- the statute of limitation and exhaustion kind of go had
5 in hand in -- in my opinion. There has to be an exhaustion
6 of something that then triggers or starts that running.
7 That's why I was asking what -- where does the -- where does
8 the statute of limitations run. In the one case, the
9 individual had done nothing. In the other one, the
10 individual had done something and had -- had basically had
11 some action that they could have then tied it to if --

12 MR. BUTLAND: I agree, your Honor. To maybe --
13 maybe make it a more generalizable rule, if -- you know, if
14 you assert final agency actions A, B, and C, and you want to
15 challenge all three of them, you can only challenge the ones
16 that occurred within six years. And in the case of
17 Backland, one of the Defendants could actually point to
18 something that was challenged within six years, but the
19 other one could not.

20 THE COURT: Okay.

21 MR. BUTLAND: Just one more quote I'll read from
22 U.S. v. Lowery, page 1203:

23 "Allowing Lowery to collaterally
24 attack the administrative proceedings
25 would effectively circumvent the six-

1 year statute of limitations we have held
2 governs review of such actions."

3 So, I understand that the statute itself says
4 civil in it, but that -- the Ninth Circuit has not felt that
5 was dispositive and applied it into -- to criminal context,
6 and I think if we're going to -- to borrow from Hitchens's
7 Razor, extraordinary claims require extraordinary evidence.

8 If they're going to claim that the statute of
9 limitations doesn't apply in criminal cases as a matter of
10 due process, there should be a case that supports that view
11 from the Ninth Circuit or from the U.S. Supreme Court, and I
12 haven't seen one in any of the briefing.

13 So, I would submit that without that case law, we
14 should defer to what the Ninth Circuit has said, and the
15 remedy, I suppose, is to take this up on appeal and ask the
16 Ninth Circuit to reconsider its prior decision or to try to
17 distinguish this in some way. I'm not candidly sure how
18 they would, but, you know, who knows?

19 But I think that would be the -- but, in the
20 meantime, I think we need to just -- we need to follow what
21 the Ninth Circuit has opined on.

22 THE COURT: Right. Understood.

23 MR. BUTLAND: Thank you, your Honor.

24 MR. GERSON: I'm sorry, Judge. I don't mean to
25 drag things out. I just want to respond very briefly

1 because I think there's a different reading of -- of
2 Backland.

3 So -- so, in Backland -- and I think it's the same
4 for Lowery, at least one of the Defendants in Backland had
5 applied for this permit to live at his mining site through
6 the Forest Service and had properly gone through the appeals
7 process, and he was then allowed to challenge it in his
8 subsequent criminal prosecution.

9 So, his subsequent criminal prosecution, triggered
10 that ability just the same way that -- that filing a civil
11 suit would have triggered. The Ninth Circuit is very clear
12 from the quote we just heard.

13 The other defendant did not go through these
14 administrative exhaustion remedies and was, therefore, not
15 allowed to. And the same thing with Lowery, where my
16 understanding is that she applied for this permit to reside
17 on the land under an American Indian treaty of some kind but
18 did not follow through the process, and it sat dormant for
19 many many years before she was eventually prosecuted. And,
20 so, it had -- it had not exhausted or run through the
21 statute of limitations.

22 In this case, you know, we're in the same position
23 where -- where the action is triggered by the most recent
24 arrest, Mr. Nunn's arrest in this case. Just like the ninth
25 Circuit says in Backland, you can then attack it in a

1 subsequent criminal proceeding. The difference is there's
2 never been any evidence and the Government hasn't supplied
3 any evidence of a way to appeal a permit to apply for a
4 permit, and the final agency action was very clear that
5 there was never going to be a permit. The historical record
6 indicates that base jumping was never going to be allowed.

7 And, so, I think you can skip over those
8 intermediate steps of -- of looking at where these -- these
9 appeal process, internal -- excuse me -- administrative
10 appeals process steps would have landed and just go straight
11 to the current prosecution which triggers the collateral
12 attack.

13 THE COURT: But then doesn't that make the -- any
14 permitting process in the parks null and void for all
15 intents and purposes?

16 MR. GERSON: Well, I think other permitting
17 processes that don't have the -- the unfortunate background
18 that base jumping does. You know, so --

19 THE COURT: I know you keep talking about the
20 unfortunate background, but I don't see the evidence of
21 that. I don't see a record that says, you know, here are 28
22 applications in one month for -- you know, for base jumping
23 that were all denied without comment. Here's an opportunity
24 -- you know, here's dialogue that had been initiated trying
25 to get the permit. There's your agency. That to me is your

1 agency action. There's your -- you know what I mean? If
2 it's a flat out denial, you know, with no explanation and
3 we're not going to have the dialogue, then -- then I could
4 give an argument that it's futile. But just the belief that
5 it's going to be denied I don't think is sufficient. Do
6 you?

7 MR. GERSON: Well, I mean, I think if it's -- if
8 it's widespread and historical enough and there's -- you
9 know, I think it is actually in Overton Park where they
10 speak to developing an evidentiary record because it's often
11 hard to develop from internal agency decision making, and
12 that case specifically calls for an evidentiary hearing on
13 the issue.

14 THE COURT: Right.

15 MR. GERSON: I'll just put it out there. But --

16 THE COURT: Because that -- that's really what
17 you're -- you would need is evidence to be able to -- to
18 prove that there's -- and I just -- I don't -- when your own
19 client didn't apply for a permit, I think it -- he's hard
20 pressed to say, I've been treated just like these other 25
21 people.

22 MR. GERSON: Well, I think it's more than 25
23 people, and I think that it really comes from extreme
24 circumstances where you've got -- again, we -- we cite to
25 the documentary where it's this person giving, you know, an

1 interview. We don't have a reason to disbelieve him or that
2 he would fabricate this, that he, you know, arbitrarily
3 stopped the permitting process for reasons that are not
4 valid or that, you know, over many many years and many many
5 fatalities that are well reported, where people were making
6 base jumps after dark or at twilight or in suspect areas in
7 order to avoid being arrested and having their -- their
8 equipment --

9 THE COURT: But is that on the National Park
10 Service or is that the assumption of risk by the particular
11 base jumper?

12 MR. GERSON: Well, I think -- I think base jumpers
13 always assume the risk, but I think that the -- the question
14 is would you assume additional risk knowing -- without
15 knowing -- sorry, maybe I'm using two negatives. If you
16 knew that there was not a drastic consequence at the end of
17 this, would you assume the risk, right. And, so, if every
18 base jumper in the base jumping community, which I
19 understand is very close-knit, understands that the rangers
20 will be out to enforce this, to arrest them to confiscate
21 their gear, that they'll end up here in this courtroom on
22 every single jump every single time with no reconsideration
23 and that's circulated widely, I think that is enough to show
24 that it's a final agency action, that that is the -- the
25 wall that you've hit in terms of applying for permits or

1 applying for permission.

2 THE COURT: All right. Mr. Backland, do you want
3 to address that or --

4 MR. BUTLAND: Your Honor, I -- I think that -- I
5 think that I probably addressed a bit of it before and also
6 in our briefing, which -- you know, which I would refer to
7 again with the two opposition briefs that we filed.

8 The one thing that I would add here is that we
9 just heard what seems to be a new final agency action which
10 is triggered by arrest. And I am not aware of that
11 constituting a final agency action because, as I think your
12 Honor has already pointed out, that is an interpretive rule
13 issue. That's a question of, okay, we have a regulation.
14 Does this conduct fall within it? That's not -- that's not
15 a final agency decision that's subject to any sort of notice
16 and comment or reasoned decision making. And, you know, and
17 we've cited quite a few cases in that regard, that with the
18 -- like, for example, with the Fifth Circuit case of a --
19 you know, a prison forbids possession of dangerous tools and
20 an inmate has a cell phone and he gets disciplined for it
21 because they say that's a dangerous tool. Well, the BOP had
22 never really held that before, but that didn't matter. Just
23 because the BOP decided we're going to punish somebody for
24 holding a cell phone under a regulation we hadn't applied to
25 that issue before, that didn't create a new agency action.

1 That was just an interpretative --

2 THE COURT: Interpretation.

3 MR. BUTLAND: Yeah, just an interpretive rule, and
4 -- and that does not require any of the notice and -- or the
5 reasoned decision requirements of the APA and -- you know,
6 and we identified all that in our brief, and I would just
7 refer to that.

8 THE COURT: Okay.

9 MR. BUTLAND: Thank you, your Honor.

10 THE COURT: Thank you.

11 MR. GERSON: I'm sorry. Just to clarify that.

12 THE COURT: Go ahead.

13 MR. GERSON: So, my position on the arrest is not
14 that it's an interpretive issue or an agency action or
15 anything else. I'm just quoting from Backland where
16 Backland, the Ninth Circuit very clearly says what triggers
17 the collateral attack, your ability to attack it is either
18 you file a lawsuit or on a subsequent arrest after you've
19 gone through whatever intervening administrative appeals.

20 So, it's -- it's not that we say that the arrest
21 itself is interpretive or anything else. It's just that
22 that is the touchstone for your ability to then challenge
23 it, just like filing suit would be.

24 THE COURT: Understood.

25 MR. GERSON: So --

1 THE COURT: And I guess following up with that,
2 then, Mr. Gerson, is my question is what were the
3 administrative appeals here that were available?

4 MR. GERSON: So, it's our position is that --

5 THE COURT: I go back to isn't it the permitting?

6 MR. GERSON: Right. So -- so, our position is
7 that a permit was never available nor was an appeal process.

8 THE COURT: Okay. So, you're essentially saying
9 it's futile.

10 MR. GERSON: That's correct.

11 THE COURT: That to the extent there is a
12 permitting process and an appeal of such process, that it's
13 futile?

14 MR. GERSON: The permit itself is certainly
15 futile, and nobody in two hearings now has given us any
16 indication of what the appeal process would actually look
17 like.

18 THE COURT: All right. And I --

19 MR. GERSON: So, I'm not sure it exists.

20 THE COURT: Yeah. I -- I would love to know what
21 is the -- you know, if I apply for a permit and I am denied
22 a permit through the National Park Service, for whatever I
23 want to apply for or, in particular, base jumping, okay,
24 because it's in there, right:

25 "The following shall require a

1 permit. The following is a compilation
2 of those activities for which a permit
3 from -- which require a permit from the
4 superintendent: Delivery or retrieval
5 of a person or object by parachute,
6 helicopter or other airborne means."

7 I want to base jump in Yosemite. I go in. I get
8 a permit from the Superintendent. I go online or wherever
9 the permit is, and I request to base jump. I -- whatever
10 the permit asks me -- I don't know. I haven't gone online
11 to look at the permitting process, but I assume, dependent
12 upon what I'm asking to do -- I mean, I know, for instance
13 we have law day every day -- every year here in the Park.
14 You know, there's certain permitting things that we need to
15 go through in order to have a small band in the park or have
16 students come up into the park. You know what I mean?
17 There's different things that -- hoops you have to jump
18 through to do certain things in the park.

19 There -- I submit that permit. At some point that
20 permit's either granted or denied. Is that it? Is there an
21 appeals process? Is there not? Does that open the dialogue
22 for the community to then come in and say, Well, how do we
23 go about to get this into the Park system?

24 MR. BUTLAND: I don't believe there's an internal
25 appeals process if you apply for a permit and are rejected,

1 your Honor. And, so, for whatever the -- you know, what
2 ever the denial would look like, either, well, we don't
3 think that you've met requirements or I suppose they could
4 just --

5 THE COURT: Or we deny it on the basis of the
6 following, A, B, C, D.

7 MR. BUTLAND: Yeah.

8 THE COURT: And that's the agency --

9 MR. BUTLAND: Or -- or just even say, Well, we
10 don't accept permits for that, you know, possibly. But the
11 -- you know, but ultimately I go back to the regulation
12 itself that we're talking about here is (a)(3), which says
13 you can't deliver by parachute or helicopter or other means
14 unless it's an emergency or unless you have a permit.

15 THE COURT: Permit.

16 MR. BUTLAND: Right. And, so, the question that
17 we have to ask is is that regulation that says prohibition
18 except in these two cases, is that arbitrary and capricious.
19 And the -- and we can't answer that question until we know
20 precisely what the argument is. You know, we can't really
21 shadowbox here. We have to have a specific argument made,
22 and what I have heard is that there are, you know, two
23 different situations, one when the regulation was enacted,
24 one --

25 THE COURT: Which is the lack of notice you're

1 saying.

2 MR. BUTLAND: Yeah. And -- and then there's some
3 kind of ambiguous when exactly it occurred, but at some
4 point it became assumed by the base jumping community that
5 there would never be a permit granted here.

6 Okay. When was that? We need a date. And I --
7 from -- for what I can tell of the briefing, it appears to
8 be sometime in the '90's, but that would have been the time
9 to challenge it, and same thing with -- with -- with
10 Backland. I mean, it says in either case, whether you
11 choose to bring an outright civil action or whether you
12 choose to collaterally attack in a criminal, in either case
13 it's got to be within six years of when the final agency
14 action occurred.

15 I would submit that if there was, in fact, a
16 ranger who says -- and I know you don't have the evidence
17 before you that -- that can prove that, but if you have
18 evidence that -- where a ranger says in 1993, I don't care
19 what's going to happen. I will never allow a permit,
20 period, well, then 1993 is the final agency action, and
21 they've got until 1999 to raise the issue, and they haven't
22 done that.

23 And, you know, another thing that makes this not
24 as significant, I'm going to go back to what was said in
25 Wind River, in the Wind River case. Why is it okay to apply

1 a statute of limitations of six years even if the person
2 hadn't been born yet at the time that the regulation was
3 enacted in the first place? And what Winder River said was
4 two things. Number one, an interested community will have
5 people who would want to -- who would have an incentive to
6 bring the exact same procedural claim. Number two, the
7 government's interest in finality trumps the interest of
8 latecomers.

9 Well, we've heard about how tightly knit this base
10 jumping community is. They talk to each other. They know
11 -- they know very much which -- you know, which parks might
12 be arguably hostile to base jumping. Even if Mr. Nunn
13 wasn't able to raise this until now, a lot of his -- a lot
14 of his colleagues could have. And none of them ever did.
15 Mr. Nunn could have raised it in 1999, and he didn't.

16 So, I will just say that I don't think that the
17 Court even needs to go into a lot of the questions of what
18 specifically does the appeal look like or what does the
19 administrative record say. I think at the end of the day,
20 that's just going to be an advisory opinion.

21 The -- the more direct way is you need to identify
22 a final agency action, and you have six years, and you
23 haven't done it. You haven't brought it within six years.
24 You had another opportunity in '99, and you didn't. I think
25 that brings this case very squarely within Backland and

1 Lowery, where you had a prior agency action, where they
2 enforced it against the exact same individual, and he didn't
3 make his argument. He -- he waived his argument at that
4 time. He shouldn't be able to bring out the exact same
5 argument 20 years later when he's arrested for the same --
6 or when he's cited, rather, for the exact same conduct.

7 So, but I -- I appreciate -- I appreciate the
8 opportunity to speak, your Honor. So, thank you.

9 THE COURT: Okay. Thank you.

10 And, with regards, I get your due process issue,
11 but I think there's other avenues to challenge that, and I
12 think that's on a vagueness challenge, right? Because we
13 see that all the time in criminal statutes all the time.
14 You know what I mean, subsequently? Old statutes being
15 challenged under vagueness grounds. You know what I mean,
16 that have been around forever too. So, I -- I don't -- I
17 get what he's saying with regards to the six years and --
18 and whether that civil statute applies or not. I -- I don't
19 know that I even need to go there. But I -- I don't think
20 it forecloses a challenge otherwise to a criminal statute,
21 that that -- that that is the only challenge that somebody
22 would otherwise have, especially when you're challenging
23 just the arbitrary and capriciousness of this particular
24 implementation, you know, and not the statute itself of
25 being constitutionally insufficient.

1 Do you see what I'm saying?

2 MR. BUTLAND: Yes.

3 THE COURT: Okay. So, all right. Anything
4 further from either side?

5 MR. GERSON: Nothing from me, your Honor. Thank
6 you.

7 MR. BUTLAND: Nothing. Nothing further.

8 THE COURT: I appreciate the insight. I
9 appreciate the further discussion. I just wanted to make
10 sure I understood both sides' arguments well, and I feel
11 like I do much better now. And, hopefully, I will be
12 getting out an opinion shortly because I know there are a
13 number of cases that are backlogged waiting for this
14 particular case.

15 So, I -- I can attest that we have a number of
16 these citations out there. Again, I don't know whether
17 anybody's applied for a permit, but I do know your client
18 was charged not only with the base jumping but with failure
19 to have the permit, which in and of itself implies that
20 there is a permitting process.

21 So, all right. Thank you.

22 MR. BUTLAND: Thank you very much, your Honor.

23 MR. GERSON: Thank you, your Honor.

24 (Proceedings concluded.)
25

1 I certify that the foregoing is a correct
2 transcript from the electronic sound recording of the
3 proceedings in the above-entitled matter.

4
5 /s/Crystal Thomas 4/19/2023
6 Transcriber, AAERT CERT *654 Date

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